



**Leitich v Asilia Africa Limited (Cause E026 of 2022)
[2023] KEELRC 997 (KLR) (2 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 997 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E026 OF 2022**

HS WASILWA, J

MAY 2, 2023

BETWEEN

MERCY CHEPKORIR LEITICH CLAIMANT

AND

ASILIA AFRICA LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this claim vide memorandum of claim dated 5th July, 2022, filed through the firm of Raydon Mwangi and Associates Advocates on the 13th July, 2022, claiming to have been terminated unfairly and seeking compensation for the unfair termination. She prayed for the following reliefs; -
 1. Two months gross salary in lieu of notice.
 2. Twelve (12) months gross salary for compensation based on section 49(1)(c) of the [Employment Act](#).
 3. Four (4) months leave pro-rate.

Claimant's case

2. The summary of the claim is that the claimant was employed by the Respondent as an assistant camp manager by a letter of offer dated 16th August, 2019, earning a gross salary of Kshs 130,000 per month.
3. That the employment contract provides for the terms of engagement and paragraph 3 provides that the employee will be paid two months' notice pay in case of termination after completion of the probationary period and 7 days' notice pay in case of termination on probationary period.



4. Accordingly, that she had served he Respondent for Four months and since the probation period was three months as per the employment contract, her employment had converted to that of a permanent employee and thus should have been paid Two months' notice period on termination not the 7 days.
5. It is her case that that the Respondent, without any consultation, increased the probation period to Four months, to justify her termination on probation period. Also that she was hounded out of the Respondent's employment without any notice or payment in lieu contrary to the dictates of Sections 35(1)(c) and 36 of the Employment Act as read with Article 41 (1) &(2) of the Constitution.
6. She also stated that she was not accorded any hearing before the said termination, when she had already completed her probation period, awaiting confirmation of her employment on permanent and pensionable basis.
7. During hearing the claimant testified as CW-1 and reiterated the contends of the claim and adopted her statement dated 5.7.2022. she added that she worked for the Respondent at its Naboisho camp from September, 2019 till termination on 2nd January, 2022. She testified that her probation period was to end in November, 2019.
8. It is her testimony that she was informed by her supervisor, one Ms. Hellen, that the probation period had been extended for a further period of one months and avers that she was not consulted before the said extension was arrived at. He however, admitted to having several meetings with the said supervisor.
9. It was her testimony that before termination, she was called by Hellen, the Respondent's field service manager, on 1st January, 2020 at 10.00 am and informed that her contract had been terminated with immediate effect. She denied receiving any notice before the said termination.
10. Upon cross examination, the claimant testified that when she was employed, the probation period was two months. That they had several meetings with her supervisor, Ms Hellen to discuss the areas that needed improvement which was recorded in a consent. She admitted writing the email to Hellen agreeing to extension of probation period, but contends that it did not receive the letter for extension of contract till 20th December, 2019. She testified that she was told the Respondent's company was not a good fit for her and her services were terminated. That she was paid in accordance with the letter of termination.
11. On re-examination she reiterated that she received the letter for extension of her probationary period on 20th December, 2019, long after the probationary period had lapsed.

Respondent's Case.

12. The Respondent entered appearance on the 4th October, 2022 and filed a defence to claim on even date, denying the entire claim and putting the claimant to strict proof.
13. It is averred that indeed the claimant was employed by the Respondent vide an employment letter dated 6th August, 2019 with the commencement dated indicated as 1st September, 2019. The probation period was indeed three months that began from 1st September, 2019.
14. During the probation period, the claimant's performance was not satisfactory, a fact which the Respondent' manager raised with the claimant in a meeting held on 28th November, 2019, between the Respondent, Ms Hellen and the Claimant, where both parties highlighted the areas of concern and claimant was informed on areas to improve.
15. The Respondent stated that in the meeting, both parties' agreed for the probation period to be increased for a further one more month to give the claimant a chance to improve. This probation



period was now to end on 4th January, 2020. This extension of contract was captured in the letter of extension dated 4th December, 2019.

16. It is averred that another meeting was held on 1st January, 2020, prior to the end of the probation period, where it was found that the claimant had not yet improved on the areas highlighted and did not meet the performance standards agreed, as a result, the Respondent resolved to terminate the services of the claimant.
17. Before the said termination, the claimant was paid 7 days' salary in lieu of notice in accordance with the terms of contract that provided for 7 days' notice period during the probationary period. The Respondent maintained that it followed the law in terminating the services of the claimant.
18. The respondent admitted to receiving the demand notice and it responded through the claimant's current firm of advocates. It averred that since the termination was done in strict adherence to the law, the claimant does not deserve any of the reliefs sought in the claim and prayed for the same to be dismissed with costs.
19. During hearing, the respondent summoned Hellen Schutte as its RW-1 who adopted her witness statement of 3.1.2023 and upon cross examination testified that the claimant was employed with effect from 1.9.2019 on a permanent and pensionable basis, subject to a three months' probation period which ended on 30th November, 2019. She stated that the claimant blended in well however there were performance issues which were discussed in the meeting of 28th November, 2019 and on 5th December, 2019, a letter for extension of the probationary period was send to the claimant. She added that during the meeting of 28th November, 2019, the parties as captured in minutes at paragraph 3 last part, agreed to the extension of the probation period. she also stated that the claimant was on leave when the letter was send to her and on returning from leave she acknowledged receipt of the letter.
20. Upon further cross examination she testified that the claimant leave application form is dated 2nd December, 2019. She also told this court that they did not give the claimant 7 days' notice but paid her in lieu of the said notice.
21. On re-examination, the witness testified that the claimant did not complete her probation period and that they paid her in lieu of notice before the end of her probation period.

Claimant's Submissions.

22. The claimant submitted on four issues; whether the claimant is entitled to two months' salary in lieu of notice, whether the claimant was terminated unfairly, whether the claimant is entitled to leave for the four months worked and who should bear costs of this suit.
23. On the first issue, it was submitted that the claimant was employed by the Respondent on permanent basis with effect from 1st September, 2019, subject to 3 months' probation notice period. That the employment contract did not indicate any extension of probation period for whatever reason as such the extension pf probation period was illegal. It was submitted that the letter extending her probation period was emailed to the claimant on 20th December, 2019, three weeks after the probation period had lapsed and the employment contract had already converted to permanents basis. To support this they relied on the case of Gladys Chelimo Bii V Kenya Power and Lighting Company where the Court relied on the case of *David Namu Kariuki v Commission for the Implementation of the Constitution* (2015) eKLR where Ndolo J held that;-

“Once the probationary period lapses without any word from the employer, the employee is deemed to be confirmed by effluxion of time (see *Jane Wairimu Machira v Mugo Waweru*



and Associates Cause No. 621 of 2012). That said, the Court finds that the Claimant was confirmed in his appointment upon expiry of the probation period set out in the letter of appointment. This claim is therefore properly before the Court.”

24. They also relied on the case of *Lenox Hodari Mwilo v Absa Bank (k) PLC* where the Court observed that;-

“...that the Claimant’s employment was subject to six months probationary period which came to an end on 12th December 2019. That after completion of the six months probationary period, the Claimant continued to work for a further period of three months, only to be summarily dismissed on March 28, 2020... The foregoing letter purported to arbitrary “extend” in retrospect an already lapsed and/or terminated probationary period and to “change” in retrospect, the date of commencement of the Claimant’s employment. This was an outright illegality on the part of the Respondent. It matters not whether or not the Claimant signed on the said in acknowledgment of receipt of the same. Signing in receipt of the said letter did not validate the contents of the letter. The said letter does not state that the Claimant had agreed to its contents. The letter simply purported to advise the Claimant on the Respondent’s apparent illegal decision. I find and hold that the Claimant was not serving probationary period when his employment was terminated by the Respondent without notice vide a letter dated March 27, 2020.”

25. The Claimant also relied on the case of *Jane Samba Mukala v Ol Tukai Lodge Limited* Industrial Court Case No. 823 of 2010 [2013] eKLR, where the Court listed the consideration to be put in place in determining a case of termination on poor performance and listed them as follows:-

“(a) Where poor performance is shown to be the reason for termination, the employer is placed at high level of proof as outlined in Section 8 of the *Employment Act* 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. (b) It is imperative on the part of the employer to show what measures were put in place to enable them assess the performance of each employee and further, what measures they have undertaken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. (c) Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weakness. (d) In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.”

26. It was submitted that even though section 42 of the *Employment Act*, allows the employer to extend probationary period, the same ought to be communicated at the beginning of the contract. It was argued that having completed the 3 months’ probation period, the claimant was now an employee on permanent and pensionable terms and her rights under Article 41 (1) of *the Constitution* were infringed when the probation period was extended.

27. On whether the termination was unfair, the claimant submitted that she was terminated without any valid reason and without subjected her to disciplinary hearing having worked passed the probation



period. It was argued that the termination on that basis was in violation of the provisions of section 41 of the *Employment Act*. To support this argument, the claimant relied on the case of *Janeth Chekemoi Machira and Jared Odhiambo v Laikipia University* [2021] eKLR where the court stated that ;-

“My understanding of Section 41 of *Employment Act* is that the employee is entitled to a fair hearing. The gist of the fair hearing includes knowing the charges against you, hearing evidence presented by any witness and cross examining such witness and also calling ones own witness. In the case of the claimants no witnesses were even called to testify against them. It is as if they were told you committed an offence of theft which they denied and then a determination to dismiss them was made. This in my view falls below a fair hearing and it is my finding that the claimants were denied a fair hearing.”

28. Accordingly, that the meeting of 28th November, 2019 cannot be said to be a disciplinary meeting for the purposes of termination because it was a general meeting for all managers and the advice given was general on all managers at the Respondent’s employ.
29. On the leave pay, the claimant submitted that she had worked for the Respondent for an aggregate period of 4 months, a fact which was not in dispute. She argued even though the Respondent claimed to have paid some money to her as terminal dues, no evidence was exhibited before this Court and since the Respondent is the custodian of all records, they ought to have furnished this Court with such evidence. Being that no evidence is on record for any pay, the claimant urged the Court to allow her claim as prayed.
30. The claimant also urged this Court to grant her costs of this Suit as she wrote a demand notice through her advocates, Nanda, Ogange and Company advocates which was never responded to.

Respondent’s Submissions.

31. The Respondent also submitted on four issues; whether the claimant’s employment was unfairly terminated, whether the claimant is entitled to 2 months’ notice pay, whether the claimant is entitled to 4 months pro-rated leave and whether the claimant is entitled to costs.
32. On the first issue, it was submitted that the employment contract under clause three, caps the notice period for termination of the contract, while on probation to 7 days. He argued that section 42 of the *Employment Act*, gives the employer latitude to extended employment period but not to exceed 6 months and while doing so to consult the employee. In this they relied on the case of *Benjamin Nyambati Ondiba v Egerton University* [2014] eKLR. On that note it was submitted that the claimant consented to the extension of the probation period by her email at page 4 of the Respondent’s bundle of documents, therefore the issue of consent is settled as it was obtained from the employee.
33. It was submitted that the reason for termination was because the claimant had failed to meet the performance standards required of her despite getting support from her employer. Further that since the claimant’s services were terminated in the probation window, she was entitled to 7 days’ notice which was duly paid for. In support of this they relied on the case of *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested party)* [2021] eKLR where the Court held that;-

“The Court will not declare that in terminating the Petitioners’ probationary contracts, the Respondent violated their constitutional rights and Section 41 of the *Employment Act* since the Respondent relied on the provisions of Section 42(1) of the Act as enacted



by Parliament, which expressly excluded persons holding probationary contracts from the provisions of Section 41.”

34. Similarly, that even though section 42(1) of the Employment Act was declared unconstitutional, the same was done in July, 2021 way after the claimant was terminated and since the law does not act retrospectively, the same is applicable to the claimant’s employment in this case as was held in John Muthomi Mathiu v Mastermind Tobacco(K) Ltd [2018] eKLR where the Court held that;-

“The probationary part of a contract of employment is the period where an employee is tested and he cannot therefore anticipate the same safeguards to be available for him/or her like for an employee already confirmed to position. Section 42 of the Employment Act makes provision that permits the dismissal of an employee without ascribing reasons.”

35. To reinforce, their arguments they relied on the case of Danish Jalango & Another v Amicabre Travel Services Limited [2014] eKLR where the Court held that;-

“There is no obligation under Section 43 and 45 for Employers to give valid and fair reasons for termination of probationary contracts, or to hear such Employees at all, little less in accordance with the rules of fairness, natural justice or equity. The termination of the probationary contract is strictly regulated by the terms of the contract. The only question the Court should ask, is whether the appropriate notice was given, or if not given, whether the Employee received pay in lieu of notice; and, whether the Employee was, during the probation period, treated in accordance with the terms and conditions of the probationary contract. The Employee has no expectation of substantive justification, or fairness of procedure, outside what the probation clause and Section 42 of the Employment Act 2007 grants. If the Employee has received notice of 7 days before termination, or is paid 7 days’ wages before termination, there can be no further demands made on the Employer. If the Employee is advised termination is because the Employer feels there should be no confirmation, there can be no additional demands for substantive justification made on the Employer. The Employer retains the discretion whether to confirm, or not confirm an Employee serving under probation. The law relating to unfair termination does not apply in probationary contracts.”

36. Accordingly, that the claimant was paid 7 days salary in lieu of notice and thus the termination was fair and in accordance with the law. In any event that the employer retains the right to confirm an employment after the probationary period.
37. On the claim for pro-rated leave days, the Respondent submitted that the claimant was paid 6 leave days in lieu, which was calculated and remitted to her at the time of termination as such, therefore the claim und eths head should not issue.
38. On costs of suit, it was submitted that Rule 28(1)(e) of the Employment and Labour Relations Court(Procedure) Rules, 2016 grants this Court discretion to award costs and as with all judicial discretion the same should be exercised judiciously. In the circumstances that since the claimant has failed to prove her case, she ought to bear the costs of the suit.
39. I have examined all the evidence and submissions of the parties herein.
40. From the documents and evidence herein, the claimant received an offer of employment vide a letter dated 8/8/2019, the letter indicated that she had been offered an appointment on permanent basis



with effect from 1st September, 2019 and it will be subject to 3 months probation period after which there will be a review.

41. On termination, the offer letter indicated that the notice period was 2 months. As per this contract then the probation period was to end on 30th November, 2019.
42. The respondent avers that the claimant probation period was extended due to poor performance and hence there was no need to be given a hearing. The issues of termination whether on probation or after, were discussed in a 3 judge bench matter Pet. No. 64 of 2015 (JJ Mbaru, Wasilwa & Abuodha in Bementure Kioko Mutuku vs the Hon. Ag & Others citing *Monica Muma Kibumbu & 6 others vs. Mount Kenya University & the AG* (2021) eKLR (Mbaru, Abuodha & Ndolo JJ where it was held that Section 42 (1) of the *Employment Act* 2007 is unconstitutional to the extent that it deprives a probationary employee of substantive and procedural fairness provided for under section 41 of the *Employment Act*.
43. In the current case, the claimant was indeed terminated whilst the respondent was of the view that she was still on probation period. She was denied a right to be heard and by virtue of the pronouncement above, she was treated unfairly and unjustly and I declare her termination so.
44. As concerns the issue of payment of notice pay upon termination, the claimant had been on probation for 3 months which season was to end on 30/11/2019.
45. At the expiry of this period, the claimant automatically became permanent and pensionable. Any communication or extension of the probation period should have been communicated on or before 30/11/2019.
46. After this day, any communication or extension of the probation period was null and void and I find that at the time the claimant was terminated, he was no longer on probation and for the contract to be terminated, the claimant was to be given 2 months notice or pay in lieu.
 1. I therefore find that the claimant was entitled to 2 months notice or pay in lieu
= 2 x 130,000 = 260,000/=
 2. I also find that the claimant is entitled to 4 months prorata leave = 4/12 x 130,000/=
= 43,333/=
 3. Due to the unfairness of the claimant's termination which also interfered with her career progression and her expectation, I award her 10 months salary as compensation for the unfair termination
= 10 x 130,000/=
= 1,300,000/=
Total Awarded = 1,603,333/=
Less statutory deductions
 4. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF MAY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE



In the presence of:

Nyaga holding brief for Mwangi for Claimant – present

Okul holding brief for Okuta for Respondent – present

Court Assistant - Fred

